IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

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No. 1147

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MICHAEL BENJAMIN WEISSMAN,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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## PETITIONER'S REPLY

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The Government's opposition to certiorari rests upon two misconceptions.

(1) Petitioner submits that he did not mutilate the draft card within the meaning of the statute [Pet. pp. 12-13] or render it "unavailable" for its intended purpose under *United States* v. *O'Brien*, 391 U.S. 367 (1968). The Solicitor-General replies [Memorandum, p. 2] "when Petitioner tore his card in half and handed it to the plainclothesman, he was deliberately making it unavailable . . . ." To draw in the handing to the plainclothesman as part of the supposed offense is misleading because it confuses "unavailability" in the *O'Brien* sense—which means destroyed or mutilated to the point of unavailability—with "unavailability" in the sense of unavailable for use by the Registrant because of nonpossession, which this Court has said is not punishable under 50 App. U.S.C. § 462(b)(3). See 391 U.S. at 380-381. Thus, the Gov-

ernment's memorandum fails to meet this showing that Petitioner's tearing the card did not mutilate or destroy it within the meaning of the statute [Pet. 4, 7, 12-13].*

(2) Petitioner submits that the record in this case taken as a whole demonstrates that the prosecution, conviction and sentence are essentially punishment for the element of public expression in his gesture of opposition to war—not for the "non-communicative impact of his conduct and for nothing else . . ." as required by *O'Brien*. 391 U.S. at 382. In the Court of Appeals the Department of Justice admitted during oral argument that Petitioner would not have been prosecuted if he had torn his draft card in the privacy of his home. The Solicitor-General makes essentially the same admission in this Court:

> . . . the circumstances of Petitioner's act are pertinent factors in any consideration of that decision [to commence prosecution]. The publicity given to Petitioner's act—not his views—was reasonably thought to create a risk of widespread imitation. [Memorandum, p. 3.]

Plainly then, the Petitioner would not have been prosecuted for any injury this tearing of the card was thought to have on the operation of the Selective Service System. Taking into account the publicity attendant upon his acting *in public at a peace rally* in a decision to prosecute necessarily means singling the accused out for punishment for publicly expressing ideas concerning war and conscription. *O'Brien* teaches that for the purposes of punishment one can separate the harm done by the act of mutilation from the concomitant expression of opinion. One cannot, consistently with the First Amendment, go

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* The subsequent act of giving the card to a detective whom Petitioner believed to be an FBI agent is important only because it insured that the two halves would remain as available for all the card's intended uses as if he had handed an undamaged card to the detective.

further and appropriately separate the public nature of action from its significance as a mode of expression. To punish a young man because he tore his draft card *in public* is to punish him for the message conveyed to the public—not for the "noncommunicative impact of his conduct *and for nothing else* . . . ." 391 U.S. at 382. (Emphasis supplied.)

The application of 50 App. U.S.C. § 462(b)(3) in the present case goes far beyond what was decided in *O'Brien*, and raises a substantial First Amendment question which has not been and should be decided by this Court.

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